No. 80-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

The Honorable RICHARD D. LAMM, Governor of the State of Colorado, et al.,

Petitioners,

v.

FIDEL RAMOS, et. al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PEGGY A. WIESENBERG
Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association
294 Washington Street
Boston, MA 02108

JAMES E. HARTLEY
HUGH Q. GOTTSCHALK
American Civil Liberties Union Foundation of Colorado
P.O. Box 8749
Denver, Colorado 80201

ALVIN J. BRONSTEIN
Counsel of Record
RALPH I. KNOWLES
National Prison Project of the American Civil Liberties Union Foundation, Inc.
1346 Connecticut Avenue, N.W.
Suite 1031
Washington, D.C. 20036
202/331-0500

Counsel for Respondents

THE CASILLAS PRESS, INC - 1717 K Street N.W. - Washington D.C. - 223-1220

QUESTIONS PRESENTED

1. Whether the federal district court abused its discretion in refusing to abstain in an action brought under 42 U.S.C. § 1983 challenging conditions of confinement in a state prison where none of the established doctrines of abstention applied.

2. Whether this Court should disturb the Court of Appeal's findings and conclusions that conditions of confinement at Colorado's maximum security prison violated the Eighth Amendment where the trial court and the appellate court found that conditions fell below every Eighth Amendment standard enunciated by this Court.

TABLE OF CONTENTS

Case: Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS WHY CERTIORARI SHOULD BE DENIED

A. There Was No Basis for the Lower Courts to Abstain 8

B. The Lower Courts Used the Proper Eighth Amendment Standards and Resolution of the Question Presented by the Petition Will Make No Difference to the Outcome of the Case 14

CONCLUSION 19

TABLE OF AUTHORITIES

CASES:

Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977) 14, 15, 16, 18

Bell v. Wolfish, 441 U.S. 520 (1979) 15

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 12

Campbell v. McGruder, 580 F.2d 521 (D.C. Cir. 1978) 14

Clutchette v. Procunier, 497 F.2d 809 (9th Cir. 1974), *mod. on other grounds on reh.*, 510 F.2d 613 (9th Cir. 1975), *rev'd on other grounds sub. nom. Enomoto v. Clutchette*, 425 U.S. 308 (1976) 14

Cohen v. Virginia, 19 U.S. 264 (1821) 12

Coker v. Georgia, 433 U.S. 584 (1977) 15

Colorado Water Conservation District v. United States, 424 U.S. 800 (1976) 11

PREVIOUS PAGE WAS BLANK

Page

Cruz v. Beto, 405 U.S. 319 (1972) 13

Estelle v. Gamble, 429 U.S. 97 (1976) 3, 15, 16, 17

Gregg v. Georgia, 428 U.S. 153 (1976) 15, 16, 17

Houghton v. Shaeffer, 392 U.S. 639 (1968) 14

Hutto v. Finney, 437 U.S .678 (1978) 15

Jones v. Diamond, _____F.2d_____, No. 78-1289 (5th Cir., Jan 29, 1981) (*en banc*) 18

Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) 14

Juidice v. Vail, 430 U.S. 327 (1977) 12

McNeese v. Board of Education, 373 U.S. 768 (1963) 13

McRedmond v. Wilson, 533 F.2d 757 (2d Cir. 1976) 14

Miller v. Carson, 563 F.2d 741 (5th Cir. 1977) 18

Monroe v. Pape, 365 U.S. 167 (1961) 13, 14

Moore v. Sims, 442 U.S. 415 (1979) 12

Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied* 438 U.S 918 (1978) 18

Preiser v. Rodriguez, 411 U.S. 475 (1973) 10, 11, 14

Procunier v. Martinez, 416 U.S 396 (1974) 11, 13

Railroad Comm'n. v. Pullman Co., 312 U.S. 496 (1941) 11

Ramos v. Lamm, 485 F.Supp. 122 (D. Colo., 1979) 8, 12

Smith v. Sullivan, 611 F.2d 1039 (5th Cir. 1980) 18

Standard Oil of California v. United States, 429 U.S. 17 (1976) ... 18

Stapleton v. Mitchell, 60 F.Supp. 51 (D. Kan. 1945) 13

Page

Taylor v. Sterrett, 499 F.2d 367 (5th Cir. 1974), *cert. denied*, 420 U.S. 983 (1975) 14

Trop v. Dulles, 356 U.S. 86 (1958) 15

Weems v. United States, 217 U.S. 349 (1910) 15

Wilwording v. Swenson, 404 U.S. 249 (1971) 10

Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) 14

Younger v. Harris, 401 U.S. 37 (1971) 12

Zwickler v. Koota, 389 U.S. 241 (1967) 13

CONSTITUTIONAL PROVISIONS:

UNITED STATES CONSTITUTION

Eighth Amendment 11, 14, 15, 17

STATUTES

28 USC 2111 17

28 USC 2254(b) 10

42 USC 1983 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1340

The Honorable RICHARD D. LAMM, Governor of the State of Colorado, et al.,

Petitioners,

v.

FIDEL RAMOS, et. al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case involves findings and conclusions by the trial court, affirmed by the Court of Appeals for the Tenth Circuit, that the totality of conditions under which prisoners at Colorado's maximum security prison ("Old Max") were housed constituted cruel and unusual punishment by all known tests enunciated by this Court. (A. 11-13; A. 100-101)[1]

---

[1] All references designated A. _____ are to petitioner's Appendix to this Petition.

Petitioners continuously misrepresent the facts in the record and rely on non-record assertions about post-trial developments which the Court of Appeals agreed have no bearing on the questions presented in this Petition. On page 2 of their Petition, state officials assert that more than a year after the District Court issued its opinion in this case, the state opened 2 new prisons; petitioners fail to state how many prisoners at Old Max will be moved when the new facilities become fully operational. There is no record before this Court on this issue. Contrary to any inferences which might be drawn from the Petition, respondents are compelled to state that, based on information provided by petitioners to the District Court in the proceedings on remand, current operative plans are that a substantial number of the approximately 1000 class members will remain in Old Max after both the new maximum security prison and the new close security prison are filled to capacity.

Contrary to petitioners' assertion on page 5 of the Petition, the record is clear that the state never decided to "replace Old Max." The Executive Director of the Department of Corrections testified at trial that based on the number of prisoners at Old Max, the projected increases in prisoner population, and the reduced capacity of the new prisons, he was not willing to say that prisoners would not be confined in Old Max. (Ault. R.Vol. 30 p. 117, 155; Pl. Exh. 1 p. VII-3; See generally A. 127) The fact is that the state never intended to replace Old Max, has not replaced Old Max, and is housing prisoners at Old Max at the present time.

The Court of Appeals found that evidence of the state's plans to construct a new prison at a future date did not constitute a defense to demonstrated present constitutional violations which the appellate court found to be substan-

tial. (A. 15 n. 11; A. 125-128) Moreover, in light of conflicting reports outside the record about post-trial developments, the Court of Appeals remanded the case to the district court to hold further proceedings to determine the status of the state's plans and what actions are required to eradicate constitutional violations. (A. 47-48)

The Court of Appeals issued its ruling on September 25, 1980. The Court of Appeals denied both parties' petitions for rehearing on November 10, 1980. (A. 139) State officials applied to the Court of Appeals for a stay; their application was denied on December 2, 1980. The State's petition to recall the mandate and reinstate the stay previously issued by the Court of Appeals pending expedited appeal was denied by Mr. Justice White on December 9, 1980.

This petition is before this Court on the record of constitutional violations which were upheld by the Court of Appeals. The appellate court concluded that the district court applied a proper standard in making its findings that state officials failed to provide prisoners with minimally adequate shelter, sanitation, food, safety and medical care. (A. 12 n. 7, 13) Taking each of those areas separately, and analyzing each area independently and apart from the totality of the conditions of confinement, the appellate court concluded that the findings were entirely supported by the record and that conditions in each area were constitutionally impermissible.

1. DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS

Applying the standard announced by this Court in *Estelle v. Gamble*, 429 U.S. 97 (1976), the Court of Appeals concluded that the State has been aware of continuing grave and systematic deficiencies in the medical care

delivery system for years, yet conditions continue to "endanger [prisoners'] health and well-being, make unnecessary suffering inevitable, and evince on the part of the State a deliberate indifference to serious health needs of the prisoner population." (A. 26-34)

On-site primary care physician coverage was found to be "grossly inadequate" causing unqualified and improperly supervised staff to misdiagnose or improperly treat inmates' medical problems resulting in life threatening situations and needless pain and suffering. (A. 29-30) A lack of staff and resources caused prisoners to go without needed medical and dental care which was not available at the infirmary. (A. 30-32)

Petitioners misrepresent the testimony of Former Executive Director of Corrections Allen Ault. (Petition p. 3) Dr. Ault testified that the legislature repeatedly refused to fund critically needed mental and physical health services which he requested. (Ault R. V. 30, pp. 82, 127) The record is uncontradicted that the legislature did not include funds for correcting known deficiencies in the medical care system in the appropriation for the new maximum security prison. (A. 160).

Critical deficiencies in the mental health staffing and resources have been brought to the attention of state officials for years and have been disregarded. (A. 84) Psychiatric services had been virtually cut out because of lack of funding, even though all the experts agreed that full-time psychiatric coverage was needed to provide a minimally adequate mental health program. (A. 33)

The mental health service at Old Max was found to be totally incapable of providing mental health care to even those prisoners identified as having severe, chronic or acute disorders. (A. 33) The lack of adequate mental

health services was found to contribute to inmate suffering and cause suicide and self-mutilation by inmates. (A. 33) Between January, 1978 and May, 1979, over 91 incidents of suicide and self-mutilation were reported. (A. 83)

2. FAILURE TO PROVIDE SAFETY

The appellate court found that since the record supports the finding that the state has been "deliberately indifferent" to the legitimate safety needs of inmates at Old Max, it was not necessary for the court to reach the issue of whether a less rigorous standards of proof is applicable in totality of conditions cases. (A. 26 n. 20)

The prison population is plagued with violence and fear of violence with efforts of many prisoners being directed at merely staying alive. (A. 22-25) Petitioners' logs indicate an unacceptable number of stabbings, assaults, fights and threats. (A. 24; A. 77) Even prisoners in protective custody are routinely threatened and attacked. (A. 24) The state's own reports have highlighted petitioners' failure to maintain adequate staffing to provide prisoners with a reasonably safe environment; despite these reports, staffing was actually cut back in fiscal year 1978-1979 evidencing a "deliberate indifference" to the legitimate safety needs of prisoners.[2] (A. 25-26) (See also Ault, R. Vol. 30 pp. 131, 139)

---

[2]The District Court found that there was no showing that present or proposed facilities are adequately staffed. (A. 127) Because petitioners have raised post-trial developments which they claim will remedy deficiencies found by the district court in the area of personal safety, Petition p. 12, respondents are compelled to inform the Court that the Colorado legislature recently denied petitioners' request for supplemental appropriations for correctional officers which the Department of Corrections deemed essential for providing protection to prisoners housed at Old Max, New Max and New Close.

3. LACK OF BASIC SHELTER

As the state recognized four years earlier and concedes in this Petition, the District Court found that "[w]ith the exception of the new administration building, the [Old Max] prison is antiquated and shows the scars left by generations of neglect, the legacy of our society's past indifference to the fate of its prisoners." (Petition p. 2; A. 62)

Recognizing that a state must provide a prisoner with reasonably adequate ventilation, sanitation, bedding, hygienic materials and utilities ". . . [i]n short, . . . shelter which does not cause [an inmate needless] degeneration or threaten his mental and physical well-being" (A. 16), the Court of Appeals sustained the district court's findings that conditions in which inmates are confined at Old Max are "grossly inadequate and constitutionally impermissible." (A.19) Cellhouses are in a serious state of disrepair and are characterized by leaking roofs; excessive odors, heat and humidity due to inadequate ventilation and temperature controls; leaking pipes, defective plumbing and accumulations of raw sewage; extensive rodent and insect infestation, trash, decayed food and other assorted litter. (A. 18-19) Many of the health and sanitation deficiencies were found to be "the result of a lack of routine maintenance and cleaning programs." (A. 18) The State's inability to meet minimal shelter and sanitation standards was found to contribute immeasurably to making the main living areas "unfit for human habitation." (A. 19)

4. UNSANITARY FOOD SERVICE

Food service to prisoners was found to present an "imminent danger to their health and safety." (A. 22) The conditions in the food preparation and service area failed to meet any known public health standards. Kitchen facilities

and equipment are obsolete and unsanitary. (A. 21) The floors, walls, windows and food storage shelves throughout the area are soiled with dirt and rodent droppings. (A. 21) State health code violations continued to exist after numerous inspections. (A. 21)

The legislature deleted the plans for a food service area at New Max and then failed to appropriate funds for purchasing new kitchen equipment and expanding the food service operation at the medium security prison to handle the additional food preparation requirements for prisoners at New Max. (A. 160) No funds have been appropriated for improving food services at Old Max.

Reviewing the evidence in light of the state's obligation to provide prisoners with food which is prepared and served under conditions which do not present an immediate danger to inmate health, the Court of Appeals affirmed the district court's conclusion that conditions in the food service have a substantial and immediate detrimental impact on health and are "grossly inadequate and constitutionally impermissible." (A. 20-22)

In light of these and other findings affirmed by the Court of Appeals, petitioners statement on page 3 that "long before this lawsuit was filed, the legislative and executive branches of government were, without judicial intervention, correcting the deficiencies in the state's system of corrections" and that "prior to initiation of this suit, defendants voluntarily addressed the problems at its maximum security prison and moved forcefully and quickly to remedy those problems" is totally belied by conditions found by the Court four years later. When petitioners raised similar factual claims below, the District Court found that:

> The assertion is nothing more than gross dissimulation. The truth of the matter is that the plan [which petitioners claim they are pursuing independently of court action in this case] is a direct result of this litigation and this court's order . . . Such is not grounds for criticism of the efforts themselves but belies their "independence" and suggests the importance of this court's continued jurisdiction. *Ramos v. Lamm,* 485 F. Supp. 122, 178 (D. Colo. 1979)[3]

REASONS WHY THE WRIT SHOULD BE DENIED

A. THERE WAS NO BASIS IN FACT OR LAW FOR THE LOWER COURT TO ABSTAIN IN THIS CASE.

The facts of record do not support the formulation or the resolution of the Question Presented by the petitioners. Petitioners seek to have this Court review whether the trial court should have deferred to the "good faith" of state officials and refused to hear substantial constitutional claims of the prisoner class "given these facts:"

> This suit was filed long after the state had decided to replace its maximum security facility; after it had appropriated millions of dollars for construction of two new prisons . . .; and after it had made numerous changes in its prison programs and policies. (Petition p. 5)

The factual basis for these claims is lacking and undercuts the very basis for review.

---

[3]Although petitioners did not include this portion of the district court's reported opinion in their appendix to this Petition, it is reprinted at pp. 178-179 of the Appendix to the Petition in *Ramos v. Lamm, petition for cert. filed,* 49 U.S.L.W. 3620 (U.S. Feb. 6, 1980) (No. 80-1329).

The State has not replaced Old Max. To the extent it is relevant, the state's assertion on pages 2 and 5 of the Petition that the suit was filed long after the state appropriated money to construct two new prisons is demonstrably untrue. Prior to the filing of this action, the state made a calculated decision to direct efforts and resources to minimum and medium security institutions instead of ameliorating conditions at Old Max. (A. 127) In 1977, the year Fidel Ramos filed this action, the legislature refused to appropriate funds to build a new maximum security prison, even though the 1977 master plan recommended that a new maximum security prison be built. (A. 149-150) Although petitioners now claim on page 2 that the 1976-1977 appropriations were for a "new close" security prison, those appropriations were for renovations at the medium security prison, and the legislature did not vote to change the use of these funds until after this action was filed and certified as a class action. (A. 153-154) It was not until April, 1978 that the legislature gave its approval for using the money appropriated for renovations at the medium security prison to build a new close security prison and appropriated funds for construction of a new maximum security prison.

Moreover, petitioners misrepresent the uncontradicted testimony of Allen Ault, Executive Director of the Colorado Department of Corrections until April 30, 1979, that he was totally unsuccessful in receiving support from the Colorado Legislature except for receiving allocations to build two prisons. Among the needs refused were: adequate staffing to provide safety, let alone services, for the prisoners (some "critical" staff positions were actually cut in the 1979-1980 budget); 10% matching money for a training program for staff that could have lowered violent incidents and idleness; psychological and psychiatric services, necessary programs for the mentally retarded

prisoners; drug and alcohol abuse programs; access to adequate medical care; and qualified case managers. (See R. Vol. 30 pp. 83, 92, 93, 99, 124, 127, 130, 131, 139) In addition, Ault was even unable in 1978 to receive resources to provide critical food services and infirmary components of the two proposed new buildings.

The asserted claims are merely an attempt to relitigate petitioners "good faith" defense which was rejected on two occasions by the courts below. Although such factual claims can be taken into account in consideration of the nature and scope of the remedy to be entered by the trial court and the amount of deference which may be accorded to state officials in the remedial stage of a case, they are not relevant to the question of abstention in a case like this where substantial constitutional violations are alleged. (A. 8, 15 n. 11, 46-47, 60, 126-129) Assuming arguendo that the state were making efforts to remedy violations of law, that has never been accepted as grounds for abstention.

The two cases relied on by petitioners for reversal do not support the state's abstention argument. The first is *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), which stands for the simple proposition that if state prisoners request relief for constitutional violations which challenge the very fact or duration of imprisonment, then relief must be sought under the federal habeas corpus statute through which Congress has explicitly required the exhaustion of state remedies before a federal forum can be used. 28 U.S.C. § 2254(b). The *dicta* regarding comity cited from *Preiser* at page 7 of the Petition was not important to the decision and is of no benefit to the state since this Court reiterated its holding in *Wilwording* v. *Swenson*, 404 U.S. 249, 251 (1971), that complaints of state prisoners relating

to the conditions of confinement properly brought under 42 U.S.C. § 1983 are not subject to the exhaustion of state remedies. *Preiser* v. *Rodriguez*, 411 U.S. at 482-499 & n. 14. Moreover, a year after *Preiser*, this Court explicitly rejected the suggestion that federal courts abstain from deciding complaints of state prisoners regarding conditions of confinement where no reasons for abstention are advanced other than comity. *Procunier* v. *Martinez*, 416 U.S. 396, 401 (1974).

The second case cited is *Colorado Water Conservation District* v. *United States*, 424 U.S. 800 (1976). The Court in that case clearly enunciated the three instances under which a federal district court has the discretion to invoke abstention as "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it."[4]

The Court of Appeals fully considered each of those instances and correctly found that none of the established doctrines of abstention apply:

1. This is not a case where the federal constitutional issues "might be mooted or presented in a different posture by a state court determination of pertinent state law." (A.8) *See also, Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941).

2. This is not a case which presents "difficult questions of state law bearing on policy problems of substantial

[4]The Court allowed the complaint in *Colorado River Water Conservation District* to be dismissed based upon the explicit policy expressed by the McCarran Amendment (43 U.S.C. § 666) to avoid piecemeal litigation of complex water rights issues, the concurrent litigation on the same issues in state court and other factors clearly not present in this Eighth Amendment prison case. (See A. 9-10) The Court specifically held, in addition, that dismissal under the abstention doctrine was inappropriate. 424 U.S. at 817-821.

public import whose importance transcends the result in the case . . . at bar." (A.9) *See also, Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).

3. This is not a case in which the respondents have attempted to enjoin a pending state proceeding initiated by a state against them in which they would have an opportunity to present their federal claim in a state forum. (A.10) *See also, Younger* v. *Harris*, 401 U.S. 37 (1971); *Moore* v. *Sims*, 442 U.S. 415 (1979); *Juidice* v. *Vail*, 430 U.S. 327 (1977).

Finally, the State maintains that the District Court was required to abstain because the respondents could have filed their action in the Colorado courts or could have intervened in two state court actions filed by prisoners. (Petitioner p. 5 n. 2)[5] Yet the Court of Appeals correctly ruled that "the mere fact that a federal claim brought in federal court, might have been brought instead in state court does not justify abstention." (citations omitted) (A.9)

In 1821, Chief Justice Marshall, in *Cohen* v. *Virginia*, 19 U.S. 264, 404 (1821) stated: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." Since then, this Court has consistently reaffirmed that principle and has refused to allow the right to litigate federal constitutional claims in federal court to be defeated by relegation to the state

---

[5]One of the state court cases cited was an individual claim filed after the proceedings in this case had commenced and sought totally different relief. The other case only challenged certain practices and conditions in administrative segregation and was not certified as a class action. Neither case involved the named plaintiffs in this case. *Ramos* v. *Lamm*, 485 F. Supp. at 173. (This portion of the district court's opinion is reprinted at pp. 166-167 of the Appendix to the Petition in *Ramos* v. *Lamm*, No. 80-1329. See n. 3 supra.)

courts. *See, e.g., Zwickler* v. *Koota*, 389 U.S. 241 (1967); *McNeese* v. *Board of Education*, 373 U.S. 768 (1963).

Nothing has been shown by petitioners to warrant reexamination of that principle. There is nothing novel about the exercise of federal jurisdiction in totality of conditions cases. Totality of conditions cases are no different from other cases where substantial violations of constitutional rights are alleged — the question for the court is the protection of constitutional rights and not as petitioners suggest whether the government needs prodding. (See Petition p. 8)

The duty of the federal courts to protect rights granted by the Constitution of the United States was aptly summarized by Judge Alfred Murrah as follows:

> We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.

Stapleton v. *Mitchell*, 60 F.Supp. 51, 55 (D. Kan. 1945), quoted with approval by the Supreme Court in *Zwickler* v. *Koota*, 389 U.S. at 248, and *McNeese* v. *Board of Education*, 373 U.S. at 674 n. 6. *See also, Procunier* v. *Martinez*, 416 U.S. 396, 405-6; *Cruz* v. *Beto*, 405 U.S. 319 (1972).

The principle was directly applied to Civil Rights Act cases such as this one in *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961):

> It is well settled, of course, that if the actions of (state officials) result in a deprivation of a federally protected right, the existence of an ade-

> quate state remedy does not bar recovery under 42 U.S.C. Sec. 1983. The "federal remedy is supplemental to the state remedy, and the latter need not first be sought and refused before the federal one is invoked."

Monroe v. *Pape*, 365 U.S. at 183. *See also, Wilwording* v. *Swenson*, 404 U.S. 249 (1971); *Prieser* v. *Rodriguez*, 411 U.S. 475 (1973); *Houghton* v. *Shaeffer*, 392 U.S. 639 (1968)[6].

The complete reversal of these principles which petitioners are requesting would be tantamount to the withdrawal of the federal forum in civil rights cases. Such a result at this date in light of the historical importance of federal civil rights litigation to our country is unthinkable.

B. RESOLUTION OF THE QUESTION PRESENTED WILL MAKE NO DIFFERENCE TO THE OUTCOME OF THIS CASE.

Both courts below found that conditions of confinement in this case violate all of the Eighth Amendment

---

[6]The Courts of Appeal have followed this Court in cases concerning the civil rights of prison inmates. *See, e.g., Campbell* v. *McGruder*, 580 F.2d 521, 525-526 (D.C. Cir. 1978); *Battle* v. *Anderson*, 564 F.2d 388, 392-393 (10th Cir. 1977); *McRedmond* v. *Wilson*, 533 F.2d 757, 760-764 (2d Cir. 1977); *Taylor* v. *Sterrett*, 499 F.2d 367, 368 (5th Cir. 1974), *cert. denied*, 420 U.S. 983 (1975); *Clutchette* v. *Procunier*, 497 F.2d 809, 814 (9th Cir. 1974), *mod. on other grounds on reh.*, 510 F.2d 613 (9th Cir. 1975), *rev'd on other grounds sub. nom. Enomoto* v. *Clutchette*, 425 U.S. 308 (1976); *Jones* v. *Metzger*, 456 F.2d 854, 856 (6th Cir. 1972); *Wright* v. *McMann*, 387 F.2d 519, 525 (2d Cir. 1967).

standards previously enunciated by this Court.[7] (A. 12-13, A. 99-100)

The State asks the Court to grant certiorari to determine the proper test to be used in ascertaining whether the Eighth Amendment is violated in prison cases. It states that this is a question of first impression and is a "logical sequel to *Bell* v. *Wolfish,*" 441 U.S. 520 (1979), in which this Court for the first time addressed the due process standard to be applied to pre-trial detainees. But as the Court explicitly stated in *Bell,* challenges to conditions and practices of confinement in prison for convicted offenders have been determined by the Court in several recent cases, including *Hutto* v. *Finney,* 437 U.S. 678 (1978), which is directly on point with this case. No issue of first impression is presented.

Petitioners attack as error some language from *Battle* v. *Anderson,* 564 F.2d 388 (10th Cir. 1977), utilized by the district court in one portion of its opinion. That language is as follows:

> While there is no constitutional right to rehabilitation, the law of this circuit is clear that the Eighth Amendment protects an inmate "from an environment where degeneration is probable

[7]Conditions which shock the conscience. *Trop* v. *Dulles,* 356 U.S. 86 (1958); *Weems* v. *United States,* 217 U.S. 349 (1910); conditions which are incompatible with evolving standards of human decency, *Hutto* v. *Finney,* 437 U.S. 678 (1978); *Trop* v. *Dulles;* conditions which involve "unnecessary and wanton infliction of pain" or the "gratuituous infliction of [mental or physical] suffering," *Coker* v. *Georgia,* 433 U.S. 584 (1977); *Estelle* v. *Gamble,* 429 U.S. 97 (1976); *Gregg* v. *Georgia,* 428 U.S. 153 (1976); conditions which constitute deliberate indifference to the prisoners' protected interest, *Estelle* v. *Gamble,* punishment which is grossly disproportionate to the offense. *Coker* v. *Georgia, supra, Gregg* v. *Georgia, supra; Weems* v. *United States, supra.*

> and self-improvement is unlikely *because of the conditions existing* which inflict *needless* suffering whether physical or mental." (Emphasis added)[8] (A.105)

See Battle v. *Anderson*, 564 F.2d 388, 393, 403 (10th Cir. 1977) citing *Estelle* v. *Gamble*, 429 U.S. 97 (1976) and *Gregg* v. *Georgia*, 428 U.S. 153 (1976). In affirming the portion of the district court ruling that conditions of shelter in this case were so grossly inadequate as to the shock the conscience and to be intolerable to basic fairness, the Court of Appeals referred to the quoted *Battle* language and clarified its earlier ruling as follows:

> A necessary corrollary to this ruling is that a state must provide . . . [an inmate with] reasonably adequate ventilation, sanitation, bedding, hygienic materials, and utilities (i.e., hot and cold water, light, heat, plumbing) . . . [citations omitted] . . . In short, a state must provide an inmate with shelter which does not cause his degeneration or threaten his mental and physical well-being. *Battle* v. *Anderson*, *supra*, 564 F.2d at 403. (A.16)
>
> * * *
>
> This includes providing nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to health and well-being of the inmates who consume it. (citations omitted) (A. 20)

---

[8]The State ignores the underlined words of this quote in attempting to trivialize the language in its argument that degeneration is inevitable. Petition at p. 11. Thus it is not just degeneration but needless suffering or gratuituous infliction of pain that is barred.

Petitioners claim that this test is too subjective and does not provide the state with clearly-defined constitutional criteria. Petition at p. 11.

Review of this question by certiorari is not warranted because a ruling on the alleged error will not affect the substantive rights of the parties. 28 U.S.C. § 2111. The Court of Appeals' ultimate conclusion of liability relied not upon the language cited but upon the express finding by the district court that the conditions in which these prisoners were forced to live violated every Eighth Amendment standard announced by this Court to wit:

> I find that *the conditions of confinement* at [Old Max] *meet all tests by all known measures of proof.* As shown by substantial evidence, these conditions shock the conscience, are incompatible with evolving standards of decency, involve unnecessary and wanton infliction of pain, and evidence both deliberate indifference to the prisoners' protected interests and "circumstances and conduct so grossly incompetent, inadequate or excessive as . . . to be intolerable to basic fairness." (Emphasis added) (A. 12 n. 7; A. 100-101 n. 20)

The State does not now challenge the underlying factual findings upon which the district court relied to reach the conclusion that all Eighth Amendment standards were violated. Therefore, even though the challenged language is valid and simply restates the ban of this Court against a *gratuitous* infliction of mental or physical suffering, *See, e.g., Estelle* v. *Gamble,* 429 U.S. 153 (1976) and *Gregg* v. *Georgia,* 428 U.S. 153 (1976), the reference to it by the district court is not determinative to the opinion of the Tenth Circuit or its mandate.

Because the Court of Appeals only relied upon standards previously adopted by this Court, any attempt by the State to create a conflict between the Tenth Circuit opinion in this case and the opinion of the Fifth Circuit in *Newman* v. *Alabama*, 559 F.2d 283, 291 (5th Cir. 1977), *cert. denied* 438 U.S. 918 (1978) is irrelevant.[9] As the Court of Appeals recognized there is no conflict between the Tenth Circuit opinion in this case and the Fifth Circuit's rulings in *Newman* and subsequent totality of conditions cases (A. 13) *See, Jones* v. *Diamond* No. 78-1289 (5th Cir. Jan. 29, 1981) (en banc); *Smith* v. *Sullivan*, 611 F.2d 1039, 1044-45 (5th Cir. 1980); *Miller* v. *Carson*, 563 F.2d 741 (5th Cir. 1977). As shown above, in this case, the Tenth Circuit focused its attention on the "core areas" of food, shelter, sanitation, medical care and personal safety – the very areas that the *Newman* opinion addressed.

To the extent that the state now claims that changes have been made since the trial which will remedy deficiencies found by the district court, see Petition p. 12, the appropriate place to present evidence of those changes is in the trial court. The Court of Appeals remanded the case to the district court specifically for the development of facts on these issues. (A. 47-48) Certiorari is not warranted because an appellate mandate can only address the record and issues originally before the court and cannot deal with possible later developments. *Standard Oil Co. of California* v. *United States*, 429 U.S. 17, 18 (1976).

---

[9]Contrary to the implications of the State, the dicta of Judge Coleman in *Newman* was not addressed to the language of *Battle, supra*, at all, but was directed at an absolute statement in a brief that "states have a duty to insure that the mental, physical and emotional status of prisoners in their custody do not deteriorate." *Newman* v. *Alabama*, 559 F.2d at 291.

CONCLUSION

For these reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

PEGGY A. WIESENBERG
Lawyers' Committee for Civil
Rights Under Law of the
Boston Bar Association
294 Washington Street
Boston, MA 02108

ALVIN J. BRONSTEIN
Counsel of Record
RALPH I. KNOWLES
National Prison Project of the
American Civil Liberties Union
Foundation, Inc.
1346 Connecticut Avenue, N.W.
Suite 1031
Washington, D.C. 20036
202/331-0500

JAMES E. HARTLEY
HUGH Q. GOTTSCHALK
American Civil Liberties Union
Foundation of Colorado
P.O. Box 8749
Denver, Colorado 80201

Counsel for Respondents